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CITATIONS

Cases:

Federal Statutes and Rules:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

SAM FOX PUBLISHING COMPANY, INC., ET AL.,
Appellants,

v.

UNITED STATES AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The District Court for the Southern District of New York denied appellants' motion to intervene without a written opinion. The court's oral statements denying the motion are reported as part of the transcript of

the proceeding of October 19, 1959 (R. 297).* These statements are reprinted as Appendix A to this Jurisdictional Statement (p. 1a), and the judgment of the court denying appellants' motion to intervene (R. 989) is reprinted as Appendix B (p. 4a).

JURISDICTION

A suit was brought against the defendant, American Society of Composers, Authors and Publishers (hereafter referred to as "ASCAP" or "the Society"), by the United States on February 26, 1941, charging violations of Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. Section 1 (Sherman Act) (R. 4). On March 4, 1941, the District Court entered a final judgment by consent (R. 37). On March 14, 1950, the judgment was amended, again by consent (R. 106). Upon motion of plaintiff, the District Court, on June 29, 1959, ordered that a hearing on a Proposed Consent Further Amended Final Judgment (hereafter referred to as "proposed order") be held on October 19, 1959, at which plaintiff and defendant were to show cause why the court should approve the proposed order (R. 48). The District Court on that day denied appellants' motion to intervene in the proceeding, and its judgment to that effect was entered on November 16, 1959 (R. 306, 989). The notice of appeal to this Court was filed in the District Court on January 14, 1960 (R. 877). The jurisdiction of this Court to review by direct appeal the judgment of the District Court

* References to the Record ("R. .....") are to the portions of the record in United States v. American Society of Composers, Authors and Publishers, Civil No. 13-95, S.D.N.Y., which relate to appellants' appeal from the denial of their motion to intervene, and which have been filed in this Court together with the Jurisdictional Statement.

denying appellants' motion to intervene is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. Section 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

The following decisions sustain the jurisdiction of this Court to review by direct appeal the judgment of the court below denying appellants' motion to intervene: *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. R. Co.*, 331 U.S. 519, 524; *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 513; *Sutphen Estates v. United States*, 342 U.S. 19.

STATUTES OR RULES INVOLVED

Federal Rule of Civil Procedure 24 reads in relevant part:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action: . . .
>
> * * *
>
> "(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought . . ."

QUESTIONS PRESENTED

The following questions are presented by this appeal:

In a proceeding brought by the United States to modify a judgment previously entered by consent in an action under the Sherman Act in order to strengthen parts of the judgment designed to protect the smaller members of an unincorporated association

of music writers and publishers from unlawful injury by the dominating members of the association:

(1) Were some of the smaller members of the association entitled to intervene in the proceeding under Federal Rule of Civil Procedure 24(a)(2) for the purpose of urging changes in the proposed modification of the judgment, which were necessary for their protection from the dominating members, upon the ground that their interest was inadequately represented by the existing parties to the proceeding—the Department of Justice and the association's Board of Directors—and that they would be bound as association members by any judgment entered in the proceeding?

(2) Is the right of individual members of the association to move to intervene in the proceeding under Federal Rule 24(a)(2), on the ground that their interest is inadequately represented by the existing parties and that they will be bound as association members by any judgment that is entered, dependent upon whether the association has been sued as an entity under Federal Rule 17(b) or in a class action under Federal Rule 23(a)(1)?

(3) Is the right of individual members of the association to intervene in the proceeding under Federal Rule 24(a)(2) to urge changes in the proposed modification of the judgment barred because, although they are members of the association, they were not named parties to the original judgment that was entered in the antitrust suit by the United States?

STATEMENT

The current proceeding in which appellants sought to intervene marks the most recent development in an antitrust suit commenced by the United States against ASCAP in the court below on February 26, 1941. For an understanding of this latest proceeding, and of the nature and purpose of appellants' motion to intervene, it is necessary to recount briefly the prior events in the suit.

ASCAP, an unincorporated association, is a performing rights licensing society. The Society's revenues are derived from royalties paid to it by those whom it has licensed to perform publicly the copyrighted musical works composed or published by ASCAP members, the royalties received being thereafter distributed to the members. From the outset, the action by the United States against the Society has been concerned with alleged violations of the antitrust laws involved in two major aspects of ASCAP's operations: (1) ASCAP's relations with the persons to whom it licenses the right to perform the musical works of its members and (2) ASCAP's internal arrangements with regard to the distribution of royalties to its publisher and writer members, and the exercise of control within the Society through the distribution of voting power among the members. Only the latter aspect of ASCAP's operations was involved in the current proceeding in the court below.

The alleged violations of the antitrust laws arising from interference by the Society with the competitive relations of its members *inter sese* are plainly expressed in the complaint. Paragraph 15(A), for example, alleges that as part of a conspiracy and combination to restrain trade and commerce in various types

of public performances of music, the defendants,* among other things, had undertaken to create the Society as an "instrumentality with a self-perpetuating Board of Directors and to vest in the twenty-four persons constituting such board the exclusive power to control the activities" of ASCAP (R. 10-11). The prayer for relief requests that the Society and its officers, agents and members be restrained from (1) electing the directors other than by a vote in which all ASCAP members would have the right to vote for their respective representatives and (2) from distributing royalties received on performances of the works of its members other than on a prescribed basis (R. 26).

On March 4, 1941, less than a week after the complaint had been filed, a judgment by consent was entered (R. 37). Limitations were imposed on the voting and other control exercised in the Society by a dominating group of publisher members who controlled the Society's Board of Directors** and changes were made in the inequitable system by which the Directors distributed royalties among the ASCAP members (R.

* The Society itself and certain of its officers were named as defendants. The latter were charged as defendants in their own right and as representatives of all the Society's members, who were alleged to "constitute a group so numerous that it would be impractical to bring all of them on before the Court by name" (R. 4-5). See pp. 26-28 below.

** ASCAP's Board of 24 directors is in effect two co-existing Boards: one consists of 12 publishers who supervise publisher revenue distributions, and the other of 12 writers who supervise writer distributions. Because of the economies of the music industry, the publisher members of the Board dominate the writer Board members. See pp. 23-24 of plaintiff's Memorandum of September 2, 1959, submitted in the proceeding below in support of the proposed order (R. 165-166).

45-46). These (as well as other provisions of the 1941 judgment) were found to be inadequate, however, and on March 14, 1950, an Amended Final Judgment was entered, again by consent (R. 106). Article XVII of this 1950 judgment, however, expressly reserved to the United States the right to apply to the court, at any time after five years from the date of its entry, "for the vacation of said Judgment, or its modification in any respect" (R. 123). Article XIII, which dealt especially with voting and grievance procedures within the Society, stated explicitly that one of the antitrust purposes of the suit was "to insure a democratic administration of the affairs of defendant ASCAP . . ." (R. 119).

It shortly became clear that the 1950 judgment was also inadequate to protect the competitive position of the smaller members of ASCAP against the dominating publisher members, who continued to control the Society's operations through their representatives on the Board of Directors, and that it would be necessary to modify the judgment substantially if the antitrust purpose of the suit against ASCAP was to be achieved. Complaints from various members led the Department of Justice in 1956 to institute an investigation of the internal operations of ASCAP under the 1950 judgment. Further information was disclosed in extensive hearings conducted in 1958 by a committee of Congress on the "Policies of ASCAP".*

* Hearings before Subcommittee No. 5, Select Committee on Small Business, House of Representatives, 85th Cong., 2d Sess., pursuant to H.R. Res. 56 (March, April 1958) (hereafter referred to as "ASCAP Hearings"). The report of the Committee is H.R. Rep. No. 1710, 85th Cong., 2d Sess. (1958) (hereafter referred to as "Hearing Report").

Rather than making application to the court below to modify the judgment pursuant to Article XVII, the Department of Justice entered into negotiations with ASCAP, through the Society's Board of Directors, and agreed with the Directors upon a proposed order amending the 1950 judgment. The proposed amendments dealt with the following areas of ASCAP's internal operations:

1. The right of ASCAP members to withdraw from ASCAP.
2. The requirement that ASCAP scientifically conduct a survey of the performances of the compositions of its members as a basis upon which to make distribution of its revenues to its members.
3. The manner in which ASCAP shall make distribution of such revenues to its members.
4. The limitation on the extent to which ASCAP may weight the votes of its members.
5. The manner in which ASCAP shall assure its members of equal treatment and an adequate opportunity to protect their rights within ASCAP; and
6. The obligation upon ASCAP to admit all duly qualified applicants to membership.

Upon motion of the Department of Justice, the court below on June 29, 1959, ordered that a hearing on the amendments be held on October 19, 1959, at which the Department and ASCAP were to show cause why the proposed order should be approved. The court's order further directed that:

> "any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon

> the ground that the [proposed order] will not accomplish the antitrust purpose of this suit". (R. 48).

Having been informed that the District Court's order of June 29 would permit ASCAP members other than the Board of Directors to participate in the October 19 proceeding only as *amici curiae*, appellants, each of whom is a publisher member of the Society, moved pursuant to Federal Rule 24(a)(2) to intervene in the proceeding in order to present proof that the proposed order would not "accomplish the antitrust purpose of this suit", and to urge changes in the proposed order which they considered necessary to protect them and other ASCAP members from the dominating publisher members (R. 173).

In support of their motion to intervene, appellants undertook to establish, pursuant to Federal Rule 24(a)(2), that neither the Society's Board of Directors nor the Department of Justice adequately represented their interest in the proceeding as ASCAP members and that they would be bound by the District Court's approval of the proposed order. Appellants asserted, and offered to prove, that the Board of Directors, who had negotiated the proposed order with the Department of Justice, was comprised of representatives of the dominating publisher members and other publishers associated with them by business dealings or ownership interest (affiliates). The domination of the Society's affairs by these publishers, to the detriment of the competitive position of its smaller members such as appellants, had made necessary the original 1941 judgment, its strengthening in 1950, and now the further amendments being proposed (R. 192-198;

242-245).* For this reason, appellants maintained, the Directors' interests were exactly antagonistic to theirs, and hence the Directors could not adequately represent appellants' interest in securing protection from the dominating publisher members of the Society.

In showing that the Department of Justice inadequately represented their interest, appellants analyzed the provisions of the proposed order and pointed out that it effected no substantial change in the existing undesirable situation in the Society with respect to voting control and the distribution of royalties to the members (R. 209-215; 245-293). Appellants set forth their views in a Pleading in Intervention filed pursuant to Federal Rule 24(c) (R. 175) and in detailed supporting memoranda containing further offers of proof.

Appellants proposed to prove, *inter alia*, that the voting provisions of the order (Section IV) left the dominating publisher members of the Society with more than 41 per cent of the total vote of the publisher members** and almost 50 per cent of the publisher member vote which had been in the past, on the average, actually cast and treated as valid in ASCAP elections (R. 245-261). They likewise offered to prove that Section II of the proposed order, dealing with the ASCAP survey of public performances of music which supplies the information that is the basis for distributions of revenues to the Society's members, failed in any substantial way to require a more accurate

* See ASCAP Hearings, pp. 34-52, 214-215; Hearing Report p. 3; Plaintiff's Memorandum of Sept. 2, 1950, pp. 23-24 (R. 165-166).

** See n. **, p. 6 above.

and reliable means of securing such information. Particularly was this so because the proposed order still permitted information as to whether and under what circumstances music had been performed to be collected by personnel who were controlled by the dominating publishers through their representatives on the Board of Directors (R. 262-276). Further, appellants offered to prove that the formula adopted by Section III(E) for distributing royalty revenues to ASCAP members gave arbitrary preference largely to the works of the dominating publishers (R. 277-293). Appellants urged that the acceptance by the Department of amendments such as these to the 1950 judgment effected and perpetuated fundamental inequities in the competitive relations of ASCAP's members with one another, and conclusively established that the Department inadequately represented appellants' interest in securing protection from the dominating members of the Society.

Appellants further maintained that, as was quite clear, they would be bound as members of the Society by any modification of the 1950 judgment the court would approve.

The District Court summarily, and without findings of opinion, denied appellants' motion to intervene at the opening of the October 19 proceeding (R. 303-306; App. A, pp. 1a-2a), and permitted them to appear only as *amici curiae*. During the course of the proceedings, however, the court stated three grounds on which it had denied the motion:

(a) that appellants were represented by the Society's Board of Directors with their consent because they were members;

(b) that appellants were not named parties to the antitrust suit against ASCAP and the suit had proceeded to a consent judgment;

(c) that appellants' interest was represented by the Government in the person of the Attorney General (R. 463-465; App. A, pp. 2a-3a; App. B, pp. 4a-5a).

After hearing Department of Justice attorneys and counsel retained by the Directors, and after hearing *amici curiae*, including appellants, the court below ordered that a vote of the members of ASCAP be taken to determine whether or not they approved the proposed order (R. 640, 650-653). The Society was directed to conduct a numerical ballot in which each member would exercise one vote as well as a ballot reflecting the weighted vote of the members, to be determined by the amount of royalty revenues each received (R. 659-660).

The membership vote was held and the results announced at a further proceeding before the court on January 6 and 7, 1960. Of 1892 publisher members who cast valid ballots, 440, or more than 40 per cent, voted against the proposed order; of 4262 writer members who cast valid ballots, 1285, or slightly more than 30 per cent, voted against the order (R. 676, 4154). The proposed order, moreover, secured the approval of only slightly more than a majority, 56 per cent, of all the ASCAP members who were eligible to vote, and less than a majority, 47.7 per cent, of all the publisher members eligible to vote (R. 750-751).

At the close of the proceedings of January 7, the District Court approved the proposed order (R. 813, 816).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The basic question which is appropriate for consideration by this Court is whether appellants' contentions with regard to the provisions of the proposed order amending the 1950 judgment establish their right to intervene in the proceeding below, pursuant to Federal Rule 24(a)(2). *Cf. Sutphin Estates v. United States*, 342 U.S. 19. No issues of fact are involved in this appeal, since no evidence was received or testimony taken by the court below in connection with appellants' motion to intervene. In denying the motion, the court had before it only the proposed order, a memorandum of facts and arguments in support of the proposed order submitted by the Department of Justice, the motion itself, appellants' Pleading in Intervention, their supporting memoranda of October 13 and October 19, and opposing memoranda submitted on the latter date by the Department of Justice and by counsel retained by the Directors of the Society. We believe that the denial of appellants' motion raises substantial questions in the application of Rule 24, a(2), particularly in antitrust proceedings brought by the United States, which warrant plenary consideration by this Court.

Intervention under Rule 24(a)(2) contemplates a situation in which two conditions exist: (a) "the representation of the applicant's interest by existing parties is or may be inadequate", and (b) "the applicant is or may be bound by a judgment in the action". The District Court's statement of its reasons for denying appellants' motion can be subsumed under these two categories, and we deal with them in that order.

A. REPRESENTATION OF APPELLANTS' INTEREST BY THE EXISTING PARTIES IS OR MAY BE INADEQUATE

1. The court below phrased its conclusion that appellants were adequately represented by the Society in various ways. It first stated that because appellants were members of the Society, they had "therefore surrendered [their] right to intervene as individuals" (R. 304; App. A, pp. 1a-2a). Later it restated this ruling as follows (R. 464; App. A, p. 3a):

> "I denied you the right to intervene first, because you were represented by the Society, and by the Society with your consent, you having become a member of it."

The court's statement is at odds with a long line of decisions which grant to a member of a group which is a party to a suit the right to intervene to protect his interest when it will not be protected by those who would normally be expected to do so. *E.g., Park & Tilford, Inc. v. Schulte*, 160 F.2d 984, 988-989 (2d Cir. 1947), *certiorari denied*, 332 U.S. 761; *Pyle-National Co. v. Angas*, 172 F.2d 125, 127-128 (7th Cir. 1949); *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953). Apparently, the court below would leave open to an ASCAP member who is aggrieved by the Directors' representation of his interest only the path of resigning from the Society. Not only does the law not compel such a choice, but, as the court below must have been aware, resignation is in fact impossible for any ASCAP member who hopes to continue to earn his livelihood as a music writer or publisher. *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 891 (S.D. N.Y. 1948); *BMI v. Taylor*, 55 N.Y.S. 2d 94, 100 (Sup. Ct. 1945). See Finkelstein, *The Composer and the Public Interest*

Regulation of Performing Rights Licensing Societies, 19 Law & Cont. Prob. 275-278, 284 (1954).

Moreover, there cannot be even the slightest doubt that the Society's Directors are unable to represent appellants' interest in securing protection from unlawful competitive injury by the dominating publisher members. The control of the Board of Directors by the dominating publishers and the anticompetitive effects of that control on the small members of ASCAP such as appellants formed the basis for one of the charges in the 1941 complaint, and was the subject of several portions of the 1941 and 1950 judgments. These very same grounds were, in fact, advanced to justify the proposed further amendments that gave rise to the proceeding in the court below. The memorandum filed by the Department of Justice in support of the proposed amendments acknowledged that the dominating publisher members control the Society's Board of Directors. See Memorandum of September 2, 1950, at p. 23 (R. 166). The Board therefore has interests which are squarely and necessarily in conflict with those of appellants and other smaller ASCAP members. Indeed, sworn testimony in the hearings before a committee of Congress disclosed numerous examples of the use by the Directors of their absolute power over the distribution of ASCAP's revenues to further the competitive interest of the dominating publishers to the detriment of the Society's other members.[9] The slight concessions to the interests of the

smaller members of ASCAP which were wrung from the dominating publishers in the proposed order cannot mask their continued interest in retaining, at the expense of the other members, as much control as possible over the Society's affairs. Plainly, appellants' requested intervention should not have been denied on the ground that "the Society" adequately represented their interest.

2. Nor can it be said that appellants' interest was adequately represented by the Department of Justice. No doubt the Department represents the public interest in antitrust suits brought by the United States, and no doubt such representation in the suit against ASCAP was intended to challenge, on behalf of the members of the Society, the unlawful competitive injuries inflicted on those members by the dominating publishers. But this statement of general principle should not be permitted to obscure the realities of this particular antitrust suit. The proof which appellants were denied the opportunity to adduce—indeed, the facts which the Department itself represented to the court—made it plain that the Department, in the agreement which it had reached with the very dominating members whom it charged with inflicting the illegal competitive injury, embraced a proposal which will surely not eliminate or, in any substantial way, reduce the control of the dominating members over the affairs of ASCAP.

Within the confines of this Statement it is possible to indicate only briefly and summarily the respects in which the Department of Justice, in agreeing with the Directors of the Society to the proposed order, inadequately represented appellants' interests.* Per-

* A more complete discussion appears in appellants' memorandum filed with the District Court on October 19, 1959 (R. 226).

haps the most disturbing aspect of the Department's agreement, however, is evidenced by Section IV of the proposed order. This section continues the weighted voting system permitted by the 1950 judgment in a manner which ensures that the dominating publishers and their affiliated members will retain the same control of ASCAP's affairs as they have had in the past. Addressing the ASCAP membership in support of the order, counsel retained by the Directors to represent the Society acknowledged that under the proposed order ten of the Society's dominating publisher members, the ten top publishers (and their affiliates), would initially be able to exercise approximately 41 per cent of the total publisher vote (R. 135, p. 34; 136, p. 36).* Appellants offered to prove, moreover, far more significant facts—first, that a comparison of the number of actual votes in ASCAP elections of recent years with the total eligible vote shows that 41 per cent of the total publisher vote actually constitutes almost 50 per cent of the average vote that was cast and treated as valid, and further that the votes of publishers other than the dominating publishers are so widely dispersed that the dominating members would certainly retain voting control and thereby continue to conduct the Society's

* It is appropriate to point out that the only figures reflecting the distribution of voting power in the Society which would result under the proposed order are those found in the August 27 speech of counsel for the Society, which were supplied by the Directors. Despite the fact that Article XVI of the 1950 judgment authorizes the Department of Justice to inspect ASCAP's books and records (R. 122), the Department offered no independent information of its own to the District Court as to the practical effect of the voting provisions of the proposed order.

affairs to the competitive disadvantage of its other members (R. 250-254).*

The acquiescence by the Department to this Section IV cannot be said to represent the interest of appellants in securing a decree which will, as set forth in Article XIII of the 1950 judgment, "insure a democratic administration of the affairs of defendant ASCAP" (R. 119). The court below, however, in its preoccupation with the question whether the proposed order would work any "improvement" in the situation, appears to have concluded that "improvements", rather than "a democratic administration", marked the limits of appellants' legitimate interest (R. 450-451; see also, *e.g.*, R. 459, 474, 568, 761).

A further glaring inadequacy in the Department's representation of appellants' interest is reflected in Section II of the proposed order, which deals with ASCAP's survey of performances of its members' works. This survey consists of two distinct operations: first, the collection and collation of information concerning the performances surveyed; second, the application of various mathematical and statistical computations to this information. Section II of the proposed order undertakes only to make the mathematical computations applied in the survey more accurate. It makes no mention of, and does nothing to correct, the

* It is too clear for any serious controversy that, under the antitrust laws and other federal statutes, such a concentration of voting power is considered more than sufficient to enable its holder to control the operations of a large business organization in which the other voting power is widely dispersed. *Cf.* United States v. Union Pacific R.R., 226 U.S. 61; North American Co. v. Securities & Exchange Commission, 327 U.S. 686, 692-693, 697; Morgan Stanley & Co. v. Securities & Exchange Commission, 126 F.2d 325, 328 (2d Cir. 1942); United States v. Sears, Roebuck & Co., 165 F. Supp. 356, 359 (S.D.N.Y. 1958).

method by which the survey information is originally collected.

Appellants sought to bring before the court evidence such as that adduced in the ASCAP Hearings before a committee of Congress, which disclosed that the entire method by which ASCAP collects its survey information is inaccurate and unreliable.* The same procedure, however, will continue under the proposed order. The personnel conducting the survey will continue to operate on the ASCAP premises under the supervision of the Directors, who are controlled by the dominating publisher members who may directly benefit from the manner in which the supervision is exercised. Obviously, if the original information which is fed to the survey sample is inaccurate, the most accurate mathematical formula devised can do nothing but compound error.

Moreover, the proposed order permits the Directors to make verbal and subjective interpretations of the formulae which determine the distribution of royalty revenues to the Society's members comparable to those made under the 1950 judgment. These interpretations will, among other things, affect the weight to be given to a particular performance of a work that is picked up in the survey, and will be made independently of the application of the statistical sampling formula itself. The Directors will thus retain their ability to influence the basic performance data that comprise the source information to which the survey formula is to be applied, and thereby to influence the royalty payments members receive (R. 262-276). A more direct conflict of interest

* *E.g.*, ASCAP Hearings, pp. 70, 84, 429-441, 443. See Plaintiff's Memorandum of September 2, 1959, p. 4 (R. 146).

affecting those whose positions make them in effect trustees of the funds collected for all ASCAP members would be hard to imagine. In fact, as appellants proposed to show, an accurate, fair and impartial survey could be secured only through the use of an independent survey organization which would insulate the system from any possibility of influence or control by any ASCAP member (R. 274; 474-477).

These inadequacies in the proposed order, and other similar features which need not now be detailed, taken together with appellants' status as members of the Society whom the Department had undertaken to protect, fully warranted appellants' requested intervention. This Court has in the past permitted intervention in litigation in which a governmental agency purported to, but in actuality did not, represent the interest of a private party seeking to intervene: *Kaufman v. Societe Internationale*, 343 U.S. 156, 161-162. One of the courts of appeals has also so ruled. *Textile Workers Union of America v. Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955), *certiorari denied*, 351 U.S. 909, and *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944), *certiorari denied*, 323 U.S. 777. Moreover, decisions allowing intervention although a governmental agency is already a party are not pliqué to fields other than that of antitrust law. Intervention has been authorized in a Government antitrust suit by a private party whose existing rights against the defendant could not later be enforced if a decree proposed by the Government were entered. *United States v. Terminal R. R. Assn. of St. Louis*, 236 U.S. 194, 199. See also *United States v. Reading Co.*, 273 Fed 848, 849-850, 855-856 (E.D. Pa. 1921), *modified and affirmed sub nom. Continental Insurance Co. v. United States*, 259 U.S. 156.

Appellants have been unable to discover any proceeding in which intervention was denied where the status of the party seeking intervention and the inadequacy of the Department's representation of his interest was at all comparable to the circumstances of this litigation. Appellants are not merely customers, licensees or competitors of the antitrust defendant who, in such cases as *United States* v. *General Electric*, 95 F. Supp. 165 (D. N.J. 1950), and *United States* v. *Bearing Distributors*, 1955 Trade Cases, Par. 68,242 (W.D. Mo. 1955), were held to have no better standing to intervene than a member of the general public. They constitute a part of the only group—the smaller members of the Society—that the Department has sought to safeguard from domination by the persons with whom it has negotiated the proposed order.

Nor did appellants seek intervention to aid their private litigation against the antitrust defendants or to seek relief unrelated to that sought by the Department of Justice. Compare *United States* v. *Bendix Home Appliances*, 10 F.R.D. 273 (S.D. N.Y. 1949); *United States* v. *Loew's*, 1957 Trade Cases Par. 68,656 (S.D. N.Y. 1957); *United States* v. *Radio Corp. of America*, 3 F. Supp. 23 (D. Del. 1933). There is no other litigation which could accomplish the purpose of the Government's antitrust suit; it is the only forum in which the unlawful competitive injury inflicted by the Society's dominating members may be remedied. Since all ASCAP members will be bound by the terms of the proposed order, the Department's acceptance and the District Court's approval of provisions that enable the dominating publisher members to retain control of voting and the distribution of revenues in the Society will effectively bar an antitrust suit by

any members challenging such control, for it will have been sanctioned by the order.*

The foregoing decisions thus provide no authority for denying the intervention sought by appellants. The generalized statements they contain to the effect that the Department of Justice represents the "public interest" in antitrust litigation are wholly inapplicable when appellants' interest—the only "interest" the Department sought to protect in undertaking to modify the 1950 judgment—was plainly not adequately represented by the Department.

No doubt it will be urged that appellants' interests were adequately served by the permission accorded them to address the court below as *amici curiae*. Quite the contrary is true. Appellants, in supporting their motion to intervene, did not merely criticize the provisions of the proposed order. They undertook to

* Appellants are aware that the court below has in the past denied motions by other members of the Society who sought to intervene in the Government litigation against ASCAP. *See* United States v. ASCAP, 1956 Trade Cases, Par. 68,324 (S.D. N.Y. 1956). No appeal was taken from that order. Moreover, the prior parties seeking to intervene, as the Court's opinion discloses, had presented their complaints against the Society's Directors to the Department of Justice only shortly before filing their motion, and the Department was investigating the complaints at the time. *See* Hansen letter, p. 182 of AS. AP Hearings. *See also* R. 760, 762-763. The proceeding in which appellants sought to intervene, on the other hand, is the final judicial stage of a three-year investigation after which the Department decided to sponsor the amendments to the 1950 judgment which, appellants assert, are plainly contrary to the interests of many of the Society's members.

Another prior attempt to intervene which was denied in United States v. ASCAP, 11 F.R.D. 511, 513 (S.D. N.Y. 1951), has no bearing at all on the issues presented by this appeal. The applicant-intervenor there was not, and had never been, an ASCAP member and was seeking to litigate in the antitrust suit his private dispute with the Society.

point out specific modifications which they were prepared to establish, by competent evidence, as necessary adequately to protect the competitive position of the smaller members of ASCAP from the dominating publishers. Appellants proposed, for example, alternative methods for distributing voting power within the Society, some of which have been applied under federal and state statutes to other forms of unincorporated business associations (R. 257-259, 295). Again, they were prepared to prove the necessity, and the feasibility, of having the Society's survey of performances conducted by an independent survey organization, which would be completely insulated from any possibility of influence or control by any ASCAP members (R. 274, 175-177).

Appellants were permitted to argue, as *amici*, that the proposed order—as a whole—should be rejected by the court because of its inadequacies in these and other respects. In support of their motion to intervene, however, appellants requested the District Court to permit them to substantiate their proposals and the necessity that they be incorporated in any amendments to the 1950 judgment, as well as the inadequacy of the representation of their interest by the Department of Justice. Appellants offered to introduce documentary and testimonial proof such as that which had been adduced at the congressional hearing (R. 229-230, 141-149). *Cf. Ugle-National Co. v. Amos*, 172 F.2d 425, 427 (7th Cir. 1949). Appellants, however, were refused permission even to make offers of proof (R. 144-145).*

*Notwithstanding Article XVII of the 1950 judgment which expressly permits the Government to apply to the court for modification in any respect (R. 123), the court below stated that it was limited to either approving the proposed order *in toto*, or, by reject-

Indeed, it is wholly unclear what facts the court below relied upon in deciding to approve the proposed order. The Government, in its memorandum in support of the order, made assertions of fact. The president of the Society, and counsel retained by the Directors, made statements of fact in reports to the members of the Society, and the reports were formally received by the District Court and are part of the record in this appeal (R. 131, 135, 136, 138). The court's opinion approving the proposed order at the conclusion of the proceedings below (R. 805-815) relies upon some of those representations (*e.g.*, R. 807-808, 808-809, 811), recites the disagreement as

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ing it, requiring a full trial on the issues framed by the 1941 complaint. Moreover, the court repeatedly stated that it could not receive testimony on the proposed amendments to the 1950 judgment and yet have the decree remain a consent decree (R. 448-449, 467, 510-512). The court expressly refused to hear argument to the contrary (R. 510-512).

The court's position at the October 19 proceeding differs markedly from the view it expressed in a hearing on June 19, 1959, at which it considered with Department of Justice attorneys and counsel retained by the Directors the procedure to be followed with respect to the proposed order. Questioned by a Department attorney as to whether the court would take evidence on the proposed order, the court responded that it had not yet "decided whether or not . . . there should be testimony taken to assure me, as the judge, that [the] public interest is being amply protected [by the proposed order]" (R. 895-896; see also R. 899). At a further hearing on June 29, 1959, the court reaffirmed that it was empowered to take testimony on the proposed order, and that since the order was "an amended [sic] to a final consent decree, it would still be a consent decree" (R. 926-927). The court's ruling at the October 19 proceeding that no testimony could be taken and that the proposed order must be approved *in toto* or not at all can not be reconciled with these earlier views, nor, indeed, with the applicable decisions of this Court. See Hughes v. United States, 342 U.S. 353, 357-358; Liquid Carbonic Corp. v. United States, 350 U.S. 869, *reversing*, 123 F. Supp. 653 (E.D.N.Y. 1955), and see also 121 F. Supp. 141 (E.D.N.Y. 1954).

to the facts between ASCAP and the Department of Justice (R. 899), and yet recites "I find no factual dispute here" (R. 814). Counsel retained by the Directors immediately felt called upon to assert that "we do not subscribe to the Government's contention with respect to the propriety of the old procedures" (*ibid.*).

The one thing which is clear is that appellants, by the denial of their motion to intervene, were precluded from adducing evidence either to supplement or to challenge that upon which the court below appears to have relied either in denying their motion, or in deciding to approve the decree, or both. Their prejudice is apparent.

Moreover, as *amici*, appellants will, unless the decision below is reversed, be barred from proceeding further to protect their interests. They will be unable to seek review of the District Court's refusal to permit proof that would have shown the insufficiencies of the proposed order, and of the Court's approval of the order as it was submitted by the Department and the Society's Directors. *E.g., Deaver v. Denver Tramway Corp.*, 23 F.2d 287, 295 (8th Cir. 1927), *certiorari denied*, 278 U.S. 616; *Winter Haven v. Gillespie*, 84 F.2d 285 (5th Cir. 1936), *certiorari denied*, 299 U.S. 606. And appellants will be denied these important rights despite the fact that they are part of the only group the Department of Justice sought to protect in undertaking to modify the 1950 judgment.

A final word is warranted on the membership vote directed by the District Court. As we have already indicated, it disclosed that the proposed order is opposed by over 40 per cent of the Society's publisher members and over 30 per cent of the writer members who cast valid ballots. All of these, presumably, were

ASCAP members who were not permitted to take part in or to influence the negotiations between the Department and the Directors on the terms of the proposed order. The existence of this large but voiceless minority within the Society who opposed approval of the proposed order underscores appellants' contention that the Department of Justice—the party to whom they and other members looked for protection from the Society's dominating publisher members—inadequately represented their interests.*

B. Appellants Are Or May Be Bound By A Judgment In The Action

It is not apparent precisely how the final ground upon which the court below rested its denial of appellants' motion is related to the requirements of Rule 24 (a)(2). As stated by the court, appellants "were not a named party to the suit, and the suit had proceeded to a consent judgment" (R. 461; App. A, p. 3a). In any event, it is quite clear that neither of the two objections which appear to be included in the court's ruling can be sustained.

The first part of the ruling—that appellants were not named parties to the suit by the United States—appears to accept the views urged by appellees against appellants' intervention. Appellees argued in the court below that the antitrust suit was brought against ASCAP as an entity under the antitrust laws and Rule

*It is not without significance that the Antitrust Subcommittee of the House of Representatives Committee on the Judiciary, after full investigation, last year recommended that increased intervention be permitted by private parties in antitrust consent decree proceedings. See p. 304 of Report on "Consent Decree Program of the Department of Justice", dated January 30, 1959 pursuant to H.R. Res. 27, 86th Cong., 1st Sess.

17(b) of the Federal Rules of Civil Procedure," and hence that appellants could not establish that any judgment in the suit would bind them as members of ASCAP.

Neither the premise nor the conclusion of the argument can be sustained. The complaint filed by the United States against ASCAP instituted a representative action against the Society and its then officers as representatives of the membership. Paragraph 3 of the complaint alleged:

> "That the members of the Society other than those members thereof specifically named herein constitute a group so numerous that it would be impractical to bring all of them on before the Court by name; therefore, the aforesaid defendants named and described herein are sued as representing all members of the Society." (R. 5).[*]

And Paragraph 18 alleged that the complaint was filed against the defendants, the Society, "its officers and directors, and the members thereof, because of their violations, *jointly and severally*" of the Sherman Act. (emphasis added) (R. 23). This language indicates that the United States in 1941 viewed its antitrust suit

[*] The aforesaid defendants were the then president, secretary and treasurer of the Society.

as a representative action brought pursuant to Rule 23(a)(1) of the Federal Rules, a true class suit in which any judgment entered for or against the representatives of a class—here the ASCAP membership—would be *res judicata* as to all the members of the class. *E.g.*, *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F.2d 403 (4th Cir. 1945); *Montgomery Ward & Co.* v. *Langer*, 168 F.2d 182 (8th Cir. 1948).*

Moreover, the conclusion would be no different even were the suit deemed brought pursuant to Federal Rule 17(b). This rule merely establishes the capacity of an unincorporated association to sue or to be sued in the federal courts to enforce a substantive right existing under the laws of the United States. Rule 17(b) could only strengthen the conclusion that a judgment against an association in such a suit would be *res judicata* as to its membership, for the members' position under the rule is comparable to that of a shareholder whose corporation is sued as an "entity". Indeed, as the Court of Appeals for the Fourth Circuit made clear in the *Tunstall* case, *supra*, representative actions under Rule 23(a) and "entity" suits under Rule 17(b) may be used interchangeably to enforce claims existing under the laws of the United States, since no issues of federal diversity jurisdiction are presented in such litigation. 148 F.2d at p. 405.** See

* The Directors of the Society have themselves invoked the *res judicata* doctrine in prior litigation involving the rights of ASCAP members. Gibbs v. Buck, 307 U.S. 66, 68, 73.

** The opinion in the Tunstall case states (148 F.2d at p. 405):

> The manifest purpose of the provision of rule 17(b) relating to suits against partnerships and unincorporated asso-

also *Underwood* v. *Maloney*, 256 F. 2d 334, 341 (3d Cir. 1958); *certiorari denied*, 357 U.S. 864; 3 Moore, *Federal Practice*, pp. 3435-3436 (2d ed. 1948).*

The second part of the court's ruling—that a consent judgment had been entered in the action—needs no extended comment. The fact that a judgment has been entered in an action provides no ground for a refusal to permit intervention where further proceedings are necessary without which the interest of the party seeking to intervene could not otherwise be protected. Thus, intervention pursuant to Rule 24(a)(2) has been authorized in order to allow the intervening party to take an appeal, where the party that had represented his interest before a judgment was entered unjustifiably refused to do so. *E.g.*, *Pellegrino* v. *Nesbit*, 203 F.2d 463, 465-466 (9th Cir. 1953); *Wolpe* v. *Poretsky*, 144 F.2d 505 (D.C. Cir. 1944), *certiorari denied*, 323 U.S. 777. So here, although the Department of Justice undertook further proceedings to protect the interests of appellants and other ASCAP members, its efforts, appellants contend, were largely inadequate. If this was the case, the fact that a judgment had once been entered in the suit is of no relevance in determining whether appellants' requested intervention in the reopened proceeding should be allowed.

* Cases such as Sperry Products, Inc. v. Association of American [illegible] 132 F.2d 408 (2d Cir. 1942), which held that a suit against an unincorporated association pursuant to Rule 17(b) is not a class action, are obviously irrelevant in determining the *res* [illegible] effect on the association's members of a decision in the suit

CONCLUSION

The questions here in issue as to the application of Rule 24(a)(2) are of the utmost importance to the smaller members of ASCAP in protecting themselves against unlawful competitive injury by the dominating members of the Society. The Department of Justice has, since 1941, made three attempts to protect the smaller members of the Society, yet under the order entered by the court below on January 7, that protection is still lacking in fundamental respects. Whether the smaller members, under the circumstances of this case, should be permitted to intervene in the proceeding below in order to attempt to secure changes in the proposed order which are necessary to protect their interests is a substantial question warranting plenary consideration by this Court.

Respectfully submitted,

CHARLES A. HORSKY
ALVIN FRIEDMAN
701 Union Trust Building
Washington 5, D. C.

HERBERT CHIETTE
11 West 60th Street
New York 23, New York

Attorneys for Appellants
Sam Fox Publishing Company, Inc.,
Mortonia Music Corporation,
Pleasant Music Publishing Corporation,
Jefferson Music Company, Inc.

COVINGTON & BURLING
Of Counsel

MARCH, 1960

APPENDIX

APPENDIX A—Excerpts from Transcript of Proceedings in *United States of America* v. *American Society of Composers, Authors and Publishers*, Civ. 13-95, S.D. N.Y., before Hon. Sylvester J. Ryan, District Judge, October 19, 1959.

APPENDIX B—Order of the United States District Court for the Southern District of New York Denying Motion to Intervene, dated November 16, 1959.

APPENDIX A

Excerpts from Transcript of Proceedings in UNITED STATES OF AMERICA v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Civ. 13-95, S.D.N.Y., before Hon. Sylvester J. Ryan, District Judge, October 19, 1959:

MR. HORSKY: Thank you, your Honor. We have filed a formal motion for leave to intervene on behalf of four publishing firms which I think you have copies of.

THE COURT: Yes. Let me get your papers. I know I have them here.

Whom do you represent?

MR. HORSKY: Four publishers who are listed in the first paragraph of the document which you have there.

THE COURT: Do I understand that you represent the Sam Fox Publishing Company, Inc.?

MR. HORSKY: That's right.

THE COURT: According to your petition they have been a member of the defendant Society since 1924?

MR. HORSKY: Yes, sir.

THE COURT: And I assume that they are still members.

MR. HORSKY: That's right.

THE COURT: And you represent Movietone Music Corporation which has been a member of ASCAP since 1932?

MR. HORSKY: Correct.

THE COURT: And I assume that corporation is also a member yet.

MR. HORSKY: Yes, sir.

THE COURT: And third is the Pleasant Music Publishing Corporation, which, it is recited, has been a member of ASCAP since 1941. I assume that corporation is still a member of the defendant Society?

MR. HORSKY: Correct.

THE COURT: And the fourth applicant, Jefferson Music Company, is a member of ASCAP since 1945?

MR. HORSKY: That is correct, and it still is a member.

THE COURT: Your application to intervene is denied.

MR. HORSKY: May I be heard on that, your Honor?

THE COURT: I will hear you later on, if you want to, but I have examined the law on the subject. You are members of the defendant Society, and I feel that you have there

fore surrendered your right to intervene as individuals. I also feel at this time, this suit having proceeded to final judgment by consent, that it will serve no useful purpose and will not promote the interests of the administration of justice or the accomplishment of the purposes of this suit to permit you to intervene. [illegible] those reasons—and, if necessary, I will write a memorandum on it although I would prefer not to do so—your application to intervene is denied. You may have an exception. You may submit a formal order so that, in the event you feel aggrieved, you may take any appropriate steps that you desire.

However, I will grant to you the same privileges that I have indicated I will grant to Mr. Eastman. I will permit you not to appear in this suit, but I will permit you to address the Court as a friend of the Court so that the Court might have, in determining whether or not the proposed amendment to the consent decree should be entered, the benefit of your observations and your comments. They may be helpful.

You will be heard, if you desire, later on as a friend of the Court. You may have an exception to any ruling denying your right to intervene.

Mr. Horsky: I wonder if you would let me argue my motion to intervene. I think I can persuade you that this is different from most of the cases you have looked up in your researches. If you are persuaded you will not change your mind, then I will not waste your time.

The Court: Mr. Horsky, I am not one who believes, in my functioning here as a judge, that I possess infallibility. I have not been divinely ordained to perform any of my duties. Perhaps, when I hear you as a friend of the Court, you may then go into this subject as to your possible right to intervene. (pp. 7-9A).

The Court: Don't you overlook one very important thing, and that is this. That the Government, represented by the Attorney General, is acting impartially to accomplish a just result, and that it is protecting not only the public but it is protecting, as best it can, and to the extent that it feels it should, this minority group, including the

minority group for which you speak? Don't you overlook that?

MR. HORSKY: No, I do not overlook that. I have not been addressing myself to that yet, because that is not the basis on which your Honor ruled out my motion to intervene in the first instance. You said I was represented by the Society.

THE COURT: Wait a minute. Excuse me. I think you have overlooked one of the reasons why I denied you a right to intervene. I denied you the right to intervene first, because you were represented by the Society, and by the Society with your consent, you having become a member of it.

MR. HORSKY: That is right.

THE COURT: Secondly, I denied you the right to intervene because you were not a named party to the suit, and the suit had proceeded to a consent judgment.

Third, I denied you the right to intervene because I felt that the interest that you represented and wanted to speak for was represented by the Government in the person of the Attorney General.

MR. HORSKY: All right. Now, let me speak to—I think I have addressed myself to why I believe the Society, in the person of Mr. Dean, and the board of directors, who speak for them, today, does not represent me, or my client.

THE COURT: I am not going to hear you at great length on that.

MR. HORSKY: I do not want to take any great length of time.

THE COURT: Let's confine ourselves to this decree.

MR. HORSKY: Let me say one word why the Department of Justice does not, and it is as simple as this—

THE COURT: I would prefer, though I do not want you to be precluded from going into it, I would prefer you did not.

MR. HORSKY: All right, let me go on to the next thing to which we object.

THE COURT: All right. (pp. 167-169).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *Defendant*.

Civil No. 13-95

ORDER DENYING MOTION FOR LEAVE TO INTERVENE

Upon the motion for intervention of Sam Fox Publishing Company, Inc., Movietone Music Corporation, Pleasant Music Publishing Corporation, and Jefferson Music Company, Inc., dated October 13, 1959, the Pleading in Intervention submitted therewith, the Order of this Court dated June 29, 1959, together with the Proposed Consent Further Amended Final Judgment, the proposed Writers' Distribution Plan and the proposed Weighting Formula submitted therewith, the Amended Final Judgment entered March 14, 1950, and upon mailings to the membership of the American Society of Composers, Authors and Publishers dated July 10, 1959, July 21, 1959, August 26, 1959, September 4, 1959, October 5, 1959 and October 9, 1959, with proof of the service thereof; and

Having heard Charles A. Horsky, Esq., attorney for said applicants, in support of said motion pursuant to Federal Rule of Civil Procedure 24(a), subparagraph (2) or, in the alternative, pursuant to Rule 24(b), subparagraph (2); and as a friend of the court, in opposition to the Proposed Consent Further Amended Final Judgment; and

Having heard Richard B. O'Donnell and Walter E. Bennett, attorneys for the plaintiff, and Arthur E. Dean, Esq., attorney for defendants in support of said Proposed Consent Further Amended Final Judgment; and

Having found that representation of the public and the applicants by the Department of Justice was adequate and

in the public interest; that applicants are members of and are represented by the Society with their consent; that applicants have permitted this cause in which they are not named as parties to proceed to judgment; and that it would not promote the interests of the administration of justice to permit the requested intervention, it is hereby

ORDERED THAT:

Applicants' motion for leave to intervene is in all respects denied.

Dated: November 16th, 1959.

s/ SYLVESTER J. RYAN
U.S.D.J.
Chief Judge